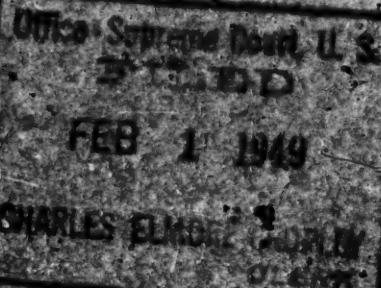


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No. 179

Opinion of the Supreme Court of the United States

— OCTOBER TERM, 1948 —

LILLIAN A. WEADE, FREDERICK M. WEADE, AND

ROBERTA L. STINEMAYER, PETITIONERS

DIEHMANN, WRIGHT & RUGG, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINETH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 179

LILLIAN A. WEADE, FREDERICK M. WEADE, AND
ROBERTA L. STINEMEYER, PETITIONERS

v.

DICHHMANN, WRIGHT & PUGH, INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Virginia (R. 24-26) are not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 123-127) is reported at 168 F. 2d 914.

JURISDICTION

The judgment of the Court of Appeals was entered May 13, 1948 (R. 128). The petition for a writ of certiorari was filed July 27, 1948, and was

granted October 11, 1948 (R. 132).¹ The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED²

1. Whether respondent, a general agent of the War Shipping Administration under the GAA 4-4-42 husbanding agreement, was the owner *pro hac vice* of the government-owned and operated vessel here involved, or was otherwise a common carrier, and therefore liable in either case for an assault upon a passenger, committed by a crew-member who was an employee of the United States and not of respondent.

¹ On November 22, 1948, the Court also granted certiorari in No. 351, *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 360, *Fink v. Shepard Steamship Company*, and No. 430, *Gaynor v. Agwilines, Inc.*, and set those three cases down for hearing immediately following the instant case. All four cases involve the question of the liability of general agents of the former War Shipping Administration. The Solicitor General appears for the general agent in all four cases, because in accordance with the wartime general agency agreement between the agent and the War Shipping Administration, the United States is obligated for any recovery effected to the extent not covered by insurance (W.S.A. Form GAA 4-4-42). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

² See also the Question Presented in the Brief for the Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, pp. 2-4.

2. Whether petitioners can recover, as third party beneficiaries, from respondent, a general agent under the GAA 4-4-42 husbanding agreement, for an alleged breach of its duties to the United States under that agreement.

3. Whether respondent, as such general agent, is liable to petitioners under general tort law, in the absence of proof of gross negligence in its procurement of the crew for engagement by the master on behalf of the United States.

4. Whether, in any event, the evidence in the record as to respondent's alleged negligence in performing its duties under the GAA 4-4-42 husbanding agreement was sufficient to permit the submission of the case to the jury.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations relating to the status and control of War Shipping Administration seamen are set forth in Appendix A to the Brief for the Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351.

STATEMENT

Petitioners Lillian A. Weade and Roberta L. Stinemeyer purchased tickets and stateroom cards, on July 25, 1945, for transportation and sleeping accommodations as passengers on the War Shipping Administration SS *Meteor* from Norfolk or Old Point Comfort, Virginia, to Washington, D. C., on August 3, 1945 (R. 22-23). Both the tickets,

which were in the standard form prescribed by WSA, and the stateroom cards expressly stated that they were issued by—

Washington-Hampton Roads Line
Operated by the United States of America
War Shipping Administration

and expressly identified respondent Dichmann as "Agent" and I. S. Walker as "Gen. Passenger Agent" for the WSA (R. 22-23). More specifically, respondent Dichmann, Wright & Pugh, Inc. was a "general agent" of ship's husband employed by the United States under the wartime GAA 4-4-42 husbanding agreement to operate the accounting and certain other parts of the shoreside business of the *Meteor* and some twenty other vessels of which WSA was operating owner in possession and control (R. 81-96, 55).

The facts which gave rise to petitioners' claims can be briefly summarized. Petitioners Lillian A. Weade and Roberta L. Stinemeyer retired to their stateroom about 11:00 p.m., the night of August 3, 1945, Mrs. Stinemeyer taking the upper berth and Mrs. Weade the lower. The weather was hot and they attempted to obtain the maximum ventilation. Despite the warning notice posted in the stateroom that passengers must keep the glass or shutters of the windows closed during the night and the fact that the window opened directly upon the boat deck of the vessel, Mrs. Weade and Mrs. Stinemeyer left open the window, leaving both the glass and the

shutter open and down, and they also left the door into the passageway ajar. About three o'clock of the following morning, a man entered the room by way of the open window, assaulted Mrs. Weade, and left the room by the same window. The second cook of the vessel, a Negro named Jack Lester Barnes, was charged with the offense. He afterward proved to have had a criminal record for fighting and knife carrying, but not for any offense comparable to that here involved (R. 28-29), and there was no evidence that his record was known to respondent. He was subsequently tried, convicted and executed for the offense.³

Originally petitioners brought two separate suits against respondent alone⁴ and petitioner Lillian A. Weade brought a separate suit against the United States alone.⁵ The suit against the United States was held in abeyance while the two suits against respondent were ordered consolidated for trial (R. 11) and gave rise to the present proceed-

³ The details of the facts concerning the operation of the vessel and the employment of Barnes are discussed in detail in Point III, *infra*, p. 32 and need not be repeated here.

⁴ *Roberta L. Stinemeyer v. Dichmann, Wright & Pugh, Inc., and George C. Hudgins*, United States District Court, Eastern District of Virginia, Norfolk Division, Civil No. 616, and *Lillian A. Weade and Frederick M. Weade v. Dichmann, Wright & Pugh, Inc., and George C. Hudgins*, United States District Court, Eastern District of Virginia, Norfolk Division, Civil No. 617.

⁵ *Lillian A. Weade v. United States of America*, United States District Court, Eastern District of Virginia, Newport News Division, Admiralty No. 80.

ings. The complaints against respondent alleged that the *Meteor* was operated by respondent as a common carrier, and that petitioners were injured because of respondent's failure to provide protection for respondent's sleeping passengers against the personal misconduct of respondent's employees, because of respondent's failure to use due care to select competent and careful employees, and because of respondent's failure to provide reasonable safeguards for the protection of passengers on the vessel and to comply with the laws relating thereto (Weade, para. 2, R. 2; Stinemeyer, para. 2, R. 7). Respondent answered denying generally the charges of negligence and want of care and pleading contributory negligence; in particular, it denied that it was a common carrier or that it owned or operated the vessel, or that the master, officers, and crew of the vessel were its employees, and it alleged that, on the contrary, the *Meteor* was operated by the United States of America, War Shipping Administration, that it was manned by government employees, and that respondent's only relation to the vessel was that of general agent servicing the vessel in accordance with the provisions of the standard form of agency agreement (R. 3-6, 8-10).

The trial court instructed the jury that the relation of respondent to petitioners was that of a common carrier which owed Mrs. Weade and Mrs. Stinemeyer the duty to "use the utmost or highest degree of practicable care and diligence" and that

respondent "was the principal and the operator of the Steamship *Meteor* at the time in question" (R. 14, 18). A verdict against respondent resulted and a motion for judgment notwithstanding the verdict was denied, the district judge holding that "While the case of *Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707, is not precisely in point, it is my view that it is controlling" (R. 24). Judgment for petitioners was entered accordingly (R. 27). On appeal, the court below reversed, in an opinion which held that respondent was not liable to passengers since it was not the owner *pro hac vice* or the principal operating the vessel and so not subject to the duty of a common carrier (R. 123-127). The court observed that if the lesser duty owed to an invitee was not to be attributed to the agent, under *Caladrola v. Eckert*, 332 U.S. 155, *a fortiori* the more onerous duty owed by a carrier to a passenger should not be here. The court below did not, therefore, reach respondent's assignments of error raising the questions of petitioners' gross contributory negligence and the several other issues which we point out hereafter (*infra*, p. 36).

SUMMARY OF ARGUMENT

On the authority of *Caladrola v. Eckert*, 332 U.S. 155, the court below held that respondent was not an operating agent or owner *pro hac vice* under the terms of the GAA 4-4-42 agreement under which the vessel here involved was being husbanded by respondent. Petitioners do not argue that point,

which is fully discussed in the Brief for the Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, this Term, to which the Court is respectfully referred. Petitioners' contentions are (1) that respondent was a common carrier who owed a duty of special care to them, and also (2) that they were entitled to recover because of alleged negligence of respondent in complying with its undertakings to the United States under the general agency agreement, and also under general tort law.

I.

The court below correctly reversed the district court on the authority of the *Caldarola* decision, which held that general agents acting under the GAA 4-4-42 husbanding agreements were not operating agents in possession and control of the vessel, or owners *pro hac vice*. The district court, after examining the GAA 4-4-42 agreement, had erroneously ruled and instructed the jury that respondent "was the principal and the operator of the Steamship *Meteor*." Its further instruction, that respondent was a common carrier by virtue of the agreement, stemmed from the same mistaken interpretation of the general agency agreement and was not an alternate ground of liability, as the court below properly recognized.

Even assuming that petitioners correctly interpret the district court's charge as holding that, while respondent was not an operating agent, it was a common carrier by reason of the duties

placed upon it by the GAA 4-4-42 agreement, that charge was erroneous. "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place." *The Niagara*, 21 How. 7, 22. It is immaterial as to whether transportation is performed in the capacity of principal or that of agent. But the asserted carrier's functions must relate to the physical movement of goods or passengers. Services not involving physical movement have always been held not to constitute the party rendering the services a common carrier. An examination of the functions performed by respondent under the general agency agreement establish that respondent, at the most, only serviced or "husbanded" the Government's vessels and thus was not a common carrier. The United States, and not respondent, transported petitioners.

Since respondent was not the owner *pro hac vice* of the vessel, nor was it independently a common carrier, the district court's charge, based on these erroneous theories, which petitioners accepted without asking for further or different instructions, was incorrect under the *Caldarola* decision, and the judgment of the court below for respondent should therefore be affirmed.

II

Petitioners now contend that respondent is also actionably liable to them for negligence in per-

forming its obligations to the United States under the general agency agreement, which petitioners treat as a third party beneficiary contract, as well as under the general principles of tort law applicable to agents. Even if correct in these contentions, petitioners could only assert liability for negligence in the procurement of crew members and not in the affording of proper safeguards aboard the vessel, since the latter is solely a function of the master of the vessel, an independent employee and agent of the United States.

A. The GAA 4-4-42 agreement was not a third party beneficiary contract. The obligations assumed by the agent under that agreement were for the benefit of the United States, not of third persons. It is clear that before a stranger can sue for breach of a contract to which he is not a party, he must show that it was intended for his direct benefit. *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230. Petitioners purport to find support for their third party beneficiary contention in Section 16 (a) of the agency agreement which *inter alia* provides that the United States shall save the agent harmless against claims of passengers. But Section 16 (a), taken as a whole, discloses that it was intended to protect general agents against their undoubted liability for the negligence of their own employees in doing the work of husbanding the vessel and against the vagaries of claims of various third parties, even if

unfounded, but not to confer rights against general agents upon third persons.

B. Under general tort law, respondent would be liable to passengers only for its own gross or wilful negligence in the procurement of crew members. Any vicarious liability for the wrongful acts of the master and crew rests upon the United States, whose employees they are, and not upon the agent. The agent is liable only for its own torts or those of its agents and employees who are doing its work. Here, the only function of the agent which related to petitioners' claims was to procure and make available to the master members of the crew for engagement by the United States. In procuring employees for others, an agent is liable to third persons only for gross negligence or wilful disregard of the rights of such third parties. Here there was no such negligence.

III

The evidence of gross negligence or wilful disregard of the rights of third persons is totally inadequate to justify submission of the case to the jury. The crew member who committed the assault was furnished through a recognized employment agency operated by respondent's principal, the United States. Manpower was in short supply and choice was limited. While the crew member had a criminal record, that record was unknown to respondent, nor was respondent placed upon notice.

even if authorized to inquire. In any event, the criminal record, for fighting and knife carrying, did not suggest the probability of his committing the crime of rape. Evidence of alleged negligence in the selection of other crew members is likewise inadequate, if not wholly wanting.

IV

Should this Court disagree with the foregoing arguments and reverse the court below on any of the grounds here urged by petitioner, then it is submitted that the case should be remanded to the court below with directions to pass upon the following questions, raised by respondent on its appeal to that court, but not passed upon below. Those points were: (1) that the district court lacked jurisdiction over petitioner Roberta L. Stinemeyer who, in any event, was not entitled to recovery; (2) that petitioner Frederick M. Weade was improperly joined as a party plaintiff; (3) that the contributory negligence of petitioners Lillian A. Weade and Roberta L. Stinemeyer bars any recovery as a matter of law, or serves to make the verdicts excessive; (4) that on any view of the evidence the verdicts were excessive; and (5) that the district court should have declared a mistrial because of prejudicial statements before the jury concerning insurance.

ARGUMENT

In *Caldarola v. Eckert*, 332 U.S. 155, this Court held that a "general agent" employed, as is re-

spondent here, under the GAA 4-4-42 husbanding agreement to manage the shoreside business of a vessel owned and operated by the United States, is not an operating agent nor an owner *pro hac vice* in possession and control of the vessel and hence owes no duty to protect third parties from injury while aboard the vessel. The court below, upon the authority of the *Caldarola* case, reversed the district court which had reached an opposite conclusion as to the effect of the GAA 4-4-42 agreement. Petitioners, while not abandoning the point, neither argue nor stress the contention that respondent was the operating agent or the owner *pro hac vice* in possession and control of the *Meteor*. In the Brief for Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, this Term, we have fully discussed the non-liability of a general agent, such as respondent, on claims arising out of the navigation, physical management, and operation of a government-owned and operated vessel, and for reasons therein set forth we submit that respondent was not the operating agent nor the owner *pro hac vice* in possession and control of the *Meteor*.

Petitioners strenuously contend, however, that the court below erred primarily in failing to hold that respondent was a common carrier, in its capacity as agent, and required to exercise the highest degree of care in selecting proper crew members and otherwise to afford proper safe-

guards for petitioners' passage, and that its failure to exercise that degree of care constitutes actionable negligence (Br. 11, 16, 18). They also contend that under the provisions of the General Agency Agreement, which they attempt to treat in certain aspects as a third party beneficiary contract, as well as under general tort law, respondent may likewise be held liable to petitioners for an alleged failure to select a proper crew and to establish proper safeguards for petitioners' passage (Br. 12, 14, 15, 16, 17, 22, 26).

We submit, on the contrary, that respondent was not, and did not hold itself out to be, a common carrier; that the GAA 4-4-42 husbanding agreement was entered into exclusively for the benefit of the United States and not of third parties; and that while respondent might be held liable to third parties for gross negligence in the procurement of employees for the United States, in this case evidence of the alleged negligence of respondent is totally inadequate for submission to the jury on that question.

Respondent is not liable to petitioners as a common carrier and the court below correctly reversed the district court on the authority of the *Caldarola* case.

Although the brief of petitioners is neither clear nor specific as to the differentiation of the points urged as bases for reversal, it seems a fair statement of petitioners' case that, in order to avoid the

dispositive precedent of *Caldarola v. Eckert*, 332 U.S. 155, on the issue of whether respondent was owner *pro hac vice* or "operating agent," petitioners predicate liability primarily upon the theory that respondent, in its capacity as agent, was a common carrier which had breached a duty owed to passengers of not only procuring a qualified crew but of "affording proper safeguards" for petitioners' protection while being transported (Pet. Br. pp. 11, 17-20, 26).

A. The district court improperly held respondent liable as owner pro hac vice or operating agent. — Apparently, petitioners seek to ground liability upon a portion of the trial court's charge to the jury in which it concluded that "Under the law of this case, by virtue of the contract which I have referred to, the defendant, Dichmann, Wright & Pugh, is what is known as a common carrier, or engaged in business as a common carrier * * *" (R. 17). But petitioners misconstrue this instruction. In fact, the District Judge had not concluded that respondent was a common carrier independently of any determination of its status as owner *pro hac vice* or "operating agent". He had reached that conclusion as a result of his prior determination that respondent was operating the steamship *Meteor* at the time in question and hence was the owner *pro hac vice*. (There can, of course, be no doubt that if respondent was operating the vessel —as distinct from its business—it was necessarily

a common carrier.) In his opening remarks, the District Judge stated (R. 14):

Gentlemen, the first question presented in this case concerns the status of the defendant, Dichmann, Wright & Pugh, Incorporated, on the question of liability for any negligence on the part of the officers or crew, or officers or employees, of the Steamship *Meteor*. There has been admitted in evidence a contract between the defendant, Dichmann, Wright & Pugh, and the War Shipping Administration of the United States. That contract which has been referred to was admitted for the purpose of showing the status of the defendant, Dichmann, Wright & Pugh, Incorporated. * * * You are told that the Court has interpreted the contract, and I now charge you, as a matter of law, that the defendant, Dichmann, Wright & Pugh, may be responsible for any act of negligence on the part of the steamship personnel, as that term is defined later. *In other words, gentlemen, for the purpose of this case, the defendant, Dichmann, Wright & Pugh, was the principal and the operator of the Steamship Meteor at the time in question.* [Emphasis supplied.]

Thus, in the latter portion of the charge quoted above, when the court referred to respondent as a common carrier which owed a duty to exercise the highest degree of care, the court was merely instructing the jury as to the character of the liability.

ty of a principal operating a vessel as owner *pro hac vice* in possession and control, and was not holding that there was an alternate ground of liability irrespective of the absence of such status. Therefore, the Court of Appeals properly recognized that the issue before it was whether respondent was the principal and owner *pro hac vice* operating the vessel, and that liability existed "if, but only if, we can read 'the contract so as to find the Agents to be owners *pro hac vice* in possession and control of the vessel.'" (168 F. 2d at 915). As we show in our Brief for Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, this Term, the *Caldarola* case is decisive on this issue and was rightly decided. The decision of the court below is accordingly correct.

B. *Respondent, as husbanding agent, was not a common carrier, nor liable as such.*—Assuming arguendo that petitioners correctly interpret the charge to the jury as characterizing respondent as a common carrier even though it was not owner *pro hac vice*, a holding that respondent who had contracted with the War Shipping Administration to be a ship's husband, to issue tickets, and to arrange for transportation of passengers, was a common carrier by virtue of the duties imposed upon it by that contract lacks both authority and principle to support it.

1. Under general law, "a common carrier is one who undertakes for hire to transport the goods of

those who may choose to employ him from place to place." *The Niagara*, 21 How. 7, 22; *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211; 1 Hutchinson, *Law of Carriers* (3d ed. 1906), sec. 47; 1 Michie, *Law of Carriers* (1915 ed.) sec. 1. It is, of course, immaterial whether the service rendered is as principal or as agent. *Union Stockyard & Transit Co. v. United States*, 308 U.S. 213; *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296; *Fleming v. Railway Express Agency, Inc.*, 161 F. 2d 659 (C.A. 7). Nor is the transporter's status as a carrier changed because it renders only a part of the transportation service. Thus, a terminal company or stockyard company may be classified as a common carrier. See, e. g. *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296; *United States v. California*, 297 U.S. 175; *Union Stock Yard & Transit Co. v. United States*, 308 U.S. 213. And since "the character of the service, in its relation to the public, determines whether the calling is a public one," *id.* at 220, the physical facilities for carriage need not be owned by the carrier. Cf. *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174; *Powell v. United States*, 300 U.S. 276; Section 1(3) of the Interstate Commerce Act, 49 U.S.C. 1(3).

But, as analysis of the cases reveals, "the character of the service" must relate to a physical movement of goods or passengers by the company in question. A "common carrier is one who under-

takes * * * *to transport*," not one who undertakes to issue tickets and arrange transportation. Thus, this Court, when examining "the character of the service" rendered by companies alleged to be common carriers, has searched for the essential element of *transportation*. In *Union Stock Yard & Transit Co. v. United States*, 308 U.S. 213, it was pointed out that loading and unloading of livestock was transportation within the Interstate Commerce Act and at the common law. *Id.* at 219, 220. Referring to terminal facilities operated by the State of California, the Court found that "all the essential elements of interstate rail transportation are present in the service rendered by the State Belt Railroad. They are the receipt and transportation for the public, for hire, of cars moving in interstate commerce." *United States v. California*, 297 U.S. 175, 182. Earlier, in *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296, Mr. Justice Brandeis noted that "the service which it [the Terminal] performs is * * * conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered," that the Terminal "undertakes to carry," that "the Terminal contracts to transport," and that "it doubtless performs the loading and unloading." *Id.* at 305-306.

On the contrary, where services of a kind ordinarily performed by a carrier but not related to actual movement are performed by other com-

panies for the carrier, such other companies have not been held to be carriers. In *Ellis v. Interstate Commerce Commission*, 237 U.S. 434, a corporation leased refrigerator cars to shippers and railroads, and maintained icing plants at which it iced the cars, the railroad paying for the icing service. It was held that the corporation "has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary is not a common carrier." *Id.* at 443. Cf. *Fischer v. Oklahoma City*, 198 Okla. 22, 24, certiorari denied, 331 U.S. 824; *Larson v. Aetna Life Ins. Co.*, 19 Wash. 2d 601; *Strickler v. Schaaf*, 199 Wash. 372.⁶

2. Since respondent, by its contract with the War Shipping Administration did not undertake the physical operation of the vessels of the United States, but only contracted to service (husband) them, we submit that respondent was not engaged as a common carrier at the time in question and thus was not bound as such to use the utmost or highest degree of care. Article 3 A of the contract (R. 82-84, 96) defined the duties of respondent as

⁶ *In re Rice*, 165 F. 2d 617 (C. A. D. C.), relied upon by petitioners (Pet. Br. pp. 19-20) to show that one may be a common carrier with less participation in the transportation of passengers than existed in the instant case, is wholly irrelevant. The lessor of the taxicab equipment in that case, who was held to be the carrier, would correspond here to the United States, not to respondent. That case, moreover, rests on the particular provisions of the District of Columbia Code and the Emergency Price Control Act.

General Agent. Respondent agreed "for the account of the United States" to: (a) "Maintain the vessels in such trade or service as the United States may direct * * *"; (b) "Collect all moneys due the United States under the Agreement and deposit, remit, or disburse the same * * * and account to the United States for all moneys collected or disbursed by it or its agents"; (c) "Equip, victual, supply and maintain the vessels, subject to such directions * * * as the United States may from time to time prescribe"; (d) " * * * procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. * * * The officers and members of the crew shall be subject only to the orders of the Master. * * *"; (e) "Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. * * * all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substantially * * * that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof"; (f) to "arrange for the transportation

of passengers when so directed, and issue or cause to be issued to such passengers customary passenger tickets. * * * See also Point III of our Brief for the Petitioner in No. 351, pp. 4-101.

Under Article 3 A (f) it was respondent's duty, as agent only, to "issue tickets" to passengers and "arrange for" their transportation "for the account of the United States" with the shipmasters to whom WSA entrusted the physical navigation and management of its vessels afloat. And the WSA-prescribed form of tickets and stateroom cards issued petitioners expressly stated they were issued by "Washington-Hampton Roads Line, Operated by United States of America, War Shipping Administration," and identified respondent as "agent" (R. 22, 23), so that it was made plain that respondent was not acting as carrier nor operating the line.

Nor could petitioners possibly have thought respondent was acting as a common carrier. Respondent had never done business as "Washington-Hampton Roads Line" or been connected with the line or with any similar service, until employed as agent for WSA. The "Washington-Hampton Roads Line" was a name given by WSA to the service of the Steamers *Meteor* and *District of Columbia* between Norfolk and Washington, when it was first organized by WSA, in order to distinguish that line from the line of the Norfolk and Washington Steamboat Company which had formerly operated one vessel in a similar service (R.

55-56, 58). Respondent had always been in the general steamship business and had not previously engaged in such a service as this; previously respondent had "operated" the "business" of some twenty cargo vessels for WSA under the GAA 4-4-42 agreement (R. 81-95), and when the Navy insisted that WSA provide nightly services between Norfolk and Washington, these two vessels were allocated to respondent under a passenger addendum (R. 95-96) to its regular GAA 4-4-42 husbanding agreement (R. 55-56, 66).

It is clear, therefore that the carriage was to be performed by the United States through the War Shipping Administration, and that respondent was employed solely as ship's husband and ticket agent "to arrange for the transportation" and not as a carrier which "undertakes to transport the goods of those who may choose to employ him." The provision in the contract that Bills of Lading were to exempt respondent from liability is utterly irreconcilable with the conception that respondent is a common carrier. It is significant that, in so far as our search of the cases reveals, such services as have been performed by respondent under its contract with the War Shipping Administration have never been construed as constituting the performer of the services a common carrier. Indeed, this Court has specifically refused to hold that "forwarders" of freight, who, like respondent here, merely arrange for transportation, are common

carriers, even though they solicit shipments, assemble them, assume responsibility for safe through carriage, select the carriers and route the shipments, break up the bulk shipment at distribution centers, take possession of the original small shipments, and arrange for delivery to the consignee. *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed *per curiam*, 309 U.S. 638; *Lehigh Valley R. R. Co. v. United States*, 243 U.S. 444; *Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R. Co.*, 220 U.S. 235.

C. *Liability as "operating agent" or as "common carrier" are equally forbidden by Caldarola.* —On either theory of the trial judge's instructions, the decision of the court below against petitioners was correct and should be affirmed. If, as we think, the gravamen of the charge was the holding that respondent was "the principal and the operator of the Steamship *Meteor*" (R. 14), the court's imposition of liability upon respondent cannot be squared with the *Caldarola* decision. If, however, the district court proceeded on the theory that respondent was, in any event, a common carrier (and therefore "bound to use the utmost or highest degree of practicable care and diligence under the circumstances existing" (R. 18)), its basis for liability was equally erroneous, as we have shown. Accordingly, the verdict and judgment in favor of petitioners cannot stand. And judgment should be

entered for respondent, since the record does not disclose that petitioners asked for further or different instructions resting liability on the alternate grounds discussed hereafter.

II

Respondent is not liable to petitioners for failure to perform any duty required by the general agency agreement, and under general tort law could be liable to petitioners only for gross negligence.

Despite their failure to ask alternate instructions on the theory of liability on which they now rely, and assuming that the points may still be raised here, petitioners—in apparent recognition of the improbability of establishing that respondent was a common carrier—adopt a second line of attack and contend that in any event respondent was negligent in procuring proper crew members (Br. 11, 12, 14-17, 22), and in affording proper safeguards for passengers, both under the terms of the General Agency Agreement and under the general principles of tort (Br. 11, 16, 26). While they do not explicitly so state, they must, in the light of the instructions given to the jury, be suggesting that the court below should have remanded the case to the district court with directions for a new trial, at which time the question of negligence, on these alternate theories, would be submitted to the jury under different and appropriate instructions. We submit, however, that under the GAA 4-4-42 husbanding agreement the obligations of respondent

ran to the United States and not to those traveling on government vessels, and that under general tort law respondent would be liable only for gross negligence. Moreover, even if petitioners were successful in their contentions, respondent could be held liable only for negligence in the procurement of crew members, and not for "failing to arrange to protect passengers" (Br. 11, 16, 26). The authority of a "general agent" ends at the shore and it has no right, much less an obligation, to interfere with the master's management of the vessel as an independent agent and employee of the United States.

A. The General Agency Agreement placed obligations upon respondent only in favor of the United States; it was not a third party beneficiary contract.—The GAA 4-4-42 husbanding agreement—discussed in detail in Point III of the Brief for the Petitioner in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351—discloses that its purpose was to provide for the management and operation of the shoreside business of vessels being physically operated by the United States. The obligations placed upon the agent were for the benefit of the United States as operating owner in possession and control, and not of third parties. The contract was carefully drawn to make certain that the agent had no authority over the master and crew, and no part in the navigation, physical management, and operation of the vessel itself. The

provision of the contract upon which petitioners seize, Article 3 A (d), is the one providing that the agent "shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel." It is significant that the master and not the agent was to requisition the men required to fill the complement and the agent was to act on his requisition. It is also clear that the crew was to be furnished to the master to enable the United States, through its agent and employee, the master, to man and navigate the vessel, and to transport the freight and passengers thereon. The agent was required to exercise reasonable care in the procurement of the crew, but that duty was owed to the United States, not to third parties.

As formulated by this Court, the rule as to third party beneficiaries is that "before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit." *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230; *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307-308; *National Bank v. Grand Lodge*, 98 U.S. 123; cf. *Prescott v. Collins*, 263 App. Div. 690, appeal dismissed, 290 N. Y. 811.

It is a general rule that public contracts are for the benefit of the community as a whole, not for the benefit of individuals. See 2 Williston, *Contracts*,

sec. 373 (Rev. ed. 1936). As restated by the American Law Institute, "a promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so * * *." See *Restatement, Contracts*, sec. 145.⁷ Thus, where a water company contracts to supply water to a municipality and the property of an inhabitant is destroyed by fire because of the failure of the company to supply water, it is the federal rule that there is no liability. *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220; cf. *Moch Co. v. Rensselaer Water Co.*, 247 N. Y. 160; *Mackubin v. Curtiss-Wright Corp.*, 57 A. 2d 318, 321 (Md.). Similarly, a user of the mails was denied recovery of consequential damages resulting from misdelivery of mail, in a suit on a postmaster's bond of which the United States was obligee. *United States v. National Surety Corp.*, 309 U.S. 165; cf. *Thomas P. Nichols & Son v. National City Bank*, 313 Mass. 421, certiorari denied, 320 U.S. 742 (F.D.I.C. contract).

⁷ Sec. 145(a) imposes liability where the intent is manifest in the contract, in light of the circumstances surrounding its formation, that the promisor shall make compensation. The illustrations under Sec. 145(a) are cases of explicit promises to indemnify for damage.

Petitioners purport to find in Section 16(a) of the Agency Agreement support for their contention that the contract itself made the agent liable to members of the public for failure to carry out its obligations to the United States. That section provides *inter alia* that the United States shall indemnify the general agent against all claims for injury to persons or property arising out of all claims and demands by passengers. But the section is, in effect, a blanket indemnity for all claims against the general agent on matters arising out of the performance of its agency. See our discussion of these and the related articles in the Brief for the Petitioner in No. 351, pp. 82-83. Not only are there many cases where agents may be liable to the public under general law for fault of their own employees, but it is also plain that the parties to the General Agency Agreement could well anticipate that courts would enter judgments against the general agents on claims which properly should have been asserted against the United States. The group of cases now before this Court emphasizes that fact by the divergence of views which they display, and even this Court has in the past been sharply divided on the question of liability. It is in this field that the indemnity provisions of Section 16(a) must be viewed as operative, and not as an attempt to confer rights on third parties.

We submit, accordingly, that whatever obligations might be placed upon the agent by the GAA

4-4-42 husbanding agreement, those obligations ran to the United States, not to third parties.

B. Under general tort law respondent would be responsible only for gross or wilful negligence in the performance of its duty to procure the officers and men required by the master to fill the complement of the vessel.—As we have shown in the Brief for the Petitioner in No. 351 (pp. 102-113), vicarious liability for the wrongful acts of the master and crew rests upon the United States, whose employees they are and whose work they do, and not upon the general agent. It is only for its own torts (those of its own employees in performing its own duties to the United States) that the agent is liable. Here the assault on Mrs. Weade was committed by an employee of the United States, a crew member, and any failure to exercise proper supervision over him, or to take general precautions to prevent such an occurrence was a matter of the internal management of the vessel, which rested upon the master, an independent agent and employee of the United States. The only function in respect of the crew members which respondent performed was to procure and make them available to the master for engagement by the United States.*

* The matter of discipline aboard the vessel was entrusted, not to the general agent, but to the master, as an independent agent and employee of the United States. See the discussion in the Brief for the Petitioner in No. 351, pp. 63-65, and *infra*, p. 36.

The general rule as to the liability of an agent in such circumstances has been set forth in the Restatement of the Law of Agency as follows:

§ 350. An agent is subject to liability if, by his acts, he creates an unreasonable risk of harm to the interest of others protected against negligent invasion.

§ 358(1). The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct of other agents unless he assists them in the performance of a tortious act or directs or permits them to commit it.

§ 79, comment a. * * * The agents so employed are the agents of the principal and not of the employing agent, who * * * is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, *unless he is negligent in their selection* * * *. [Emphasis supplied.]

The general standard of care by which "negligence" is measured is defined by Section 282 of the Restatement of Torts as—

* * * any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm.

It is hornbook law that "the standard established by law for the protection of others against unreasonable risk of harm," in the selection by one

agent of other agents or subagents of the principal, is no more than absence of gross carelessness or the wilful disregard of third persons' rights. *Donn v. Kunz*, 52 Ariz. 219, 223; *Smith v. Rutledge*, 332 Ill. 150, 155; *White v. Macoubrey*, 309 Pa. 266, 268; *Weaver v. Foundation Co.*, 310 Pa. 310, 314. Thus, it is only if respondent acted, in its procurement of officers and crew for engagement by the master, with gross carelessness or wilful disregard of the rights of others that it can be held liable under general tort law. But as we show below (pp. 33-36), there was no negligence at all in this case, and plainly no gross negligence; accordingly, respondent, not being vicariously liable for Barnes's assault, may not be held liable for damages.

III

The record is barren of any substantial evidence of negligence by respondent in the performance of its duties of procuring crew members and arranging for petitioners' transportation.

We believe the record fully demonstrates that respondent was not guilty of any fault or negligence in performing its contractual duties to the United States of (a) procuring the crew for employment by the Government and (b) arranging for the transportation of passengers by the Government.

There is no evidence to support petitioners' charge that respondent was negligent in procuring Barnes for employment. Under the provisions of

Article 3A(d) of the GAA 4-4-42 agreement, the master of the *Meteor* was procured by respondent, and upon acceptance became an agent and employee of the United States, not of respondent, and the officers and crew were subject only to the master's orders (R. 83). In accordance with the agreement, respondent procured Captain George C. Hudgins as master, and aided him in obtaining a crew to man and navigate the vessel (R. 56, 58). Labor and employment conditions were abnormal in wartime and the turnover of men was very great (R. 33-34, 56-58, 71, 74). WSA maintained a recruitment and manning pool in Norfolk to which men reported and were assigned to WSA's various vessels, including the *Meteor*, bringing assignment slips to the vessel (R. 57, 60). Barnes, the accused colored cook, was thus sent from the pool by WSA's Recruitment and Manning Organization with an assignment slip (R. 60, 74). It was not respondent's duty, or indeed within its power, to make any further investigation after he had been passed by WSA and the Coast Guard.⁹ But if respondent had made further investigation it may

* Respondent's president testified (R. 60) :

"A. I can only say, in the case of this man, who had been previously handled by the governmental agencies, that we took their investigation as sufficient."

"Q. Do you have the investigation that was made by these other agencies as to this Negro man?

"A. No. When he came down with a slip from the pool and his certificate from the Coast Guard, that was sufficient."

be doubted that it could, consistent with government policy, have rejected Barnes. His "criminal record", on which petitioners rely so heavily, included no offenses of the character of which he was convicted here, but consisted of three convictions of "fighting," a charge of violating the probation law and one of carrying a concealed weapon (R. 28-29). It appears that on the night of the occurrence Barnes had been drinking, contrary to the regulations of "the company" (i. e., the Washington-Hampton Roads line) as well as of the Coast Guard (R. 41-42). But there was no evidence that he had done so before, or that the Government's shipmaster, much less respondent's shoreside personnel, was aware of such conduct. On the contrary, so far as was known, Barnes was unusually quiet and orderly (R. 74, 33).

Nor was there any evidence in support of petitioners' charge that respondent had failed to procure proper or sufficient watchmen. There were three decks to the vessel, and in compliance with Coast Guard regulations there were three watchmen whose duties were generally divided so that there were two inside or "saloon, [cabin] watchmen" and one "deck [fire patrol] watchman" (R. 31, 37-39, 110). Petitioners attempt to argue that the duties of the watchmen must be so regulated that there is one man on each deck at all times (Br. 4, 13). But this is totally unsupported by the Coast Guard regulation which merely directs that

"Vessels carrying passengers shall during the night time keep a suitable number of watchmen in all patrol quarters and on each deck." (R. 39, 110). Petitioners have never attempted to prove or contend that the crew complement specified in the *Meteor's* documents required more than the three watchmen which the testimony shows were aboard, or that the master had requisitioned more men than respondent had furnished.

The watchman assigned by the master to the deck where the stateroom of Mrs. Weade and Mrs. Stinemeyer was situated possessed the proper seaman's certificates (R. 79-80, 112). He was properly instructed by the Government's master and officers in his duty to patrol inside and outside every twenty to thirty minutes and to remain alert, and appears to have done so (R. 80, 113-115). Much is also made of the fact that during his daytime off-duty hours Mr. Adkins, the watchman assigned to the deck where petitioners' stateroom was situated, was employed by a concessionaire to fix slot machines (Br. 4-5, 13). But the record shows that Mr. Adkins had been instructed that he could not repair the machines when he was on duty for the ship, but the Chief Purser, Mr. Rosenberg, simply took them out of service on such occasions (R. 111-112), and there is no testimony that Adkins had ever violated these instructions.

The record thus shows that there was no negligence by respondent, or, indeed, by anyone else

concerned. In any event, the matters of the assignment and orders of crew members and their supervision are questions of the internal management of a WSA vessel, which the United States had delegated exclusively to the master, and with which respondent had no right to interfere. Respondent's authority stopped at the shore, and the most it could do would be to report the master to the WSA port director. In sum, the record does not disclose any negligence of respondent at all, and certainly no gross negligence; and the negligence which petitioners charge is not of persons for whom this respondent is liable.

IV

Respondent's grounds of appeal not disposed of by the Court of Appeals

If, contrary to the contentions we have advanced above, this Court should hold either that respondent was a common carrier, or that the record contains sufficient evidence of gross negligence upon which the case should go to the jury on the issues of petitioners' putative rights as third-party beneficiaries under the general agency agreement, or of respondent's general tort liability, then it is respectfully requested that the cause be remanded to the court of appeals with directions that that court dispose of the points raised by respondent's appeal which were not decided by the court below at the prior hearing. Those points were (1) that the district court lacked jurisdiction over peti-

tioner Roberta L. Stinemeyer who, in any event, was not entitled to recovery; (2) that petitioner Frederick M. Weade was improperly joined as a party plaintiff; (3) that the contributory negligence of petitioners Lillian A. Weade and Roberta L. Stinemeyer bars any recovery as a matter of law or serves to make the verdicts excessive; (4) that in any event the verdicts were excessive; and (5) that the district court should have declared a mistrial because of prejudicial statements before the jury concerning insurance:

1. If this Court should affirm the decision of the Court of Appeals for the Fourth Circuit in *National Mutual Ins. Co. of the District of Columbia v. Tidewater Transfer Co., Inc.*, No. 29, this Term, there is a jurisdictional lack of diversity of citizenship between petitioner Roberta L. Stinemeyer, a citizen of the District of Columbia, and respondent, Dichmann, Wright & Pugh, Inc., a Delaware corporation (R. 6-7, 8). At the pre-trial hearing, this issue as to diversity jurisdiction was raised by respondent, but the district court ruled against respondent's contention and consolidated petitioner Stinemeyer's case with the others. Irrespective of the question of jurisdiction, Roberta L. Stinemeyer may not be entitled to any recovery herein because she sustained no actual personal injuries as a result of the trespass by Barnes, nor was there any physical assault upon her person.

2. The claim of petitioner Frederick M. Weade, husband of petitioner Lillian A. Weade, was grounded on the deprivation of the services and society of his wife and the accrual of medical expenses as a result of the injuries sustained by her (R. 3). Under the law of Virginia, which appears to be controlling on the District Court for the Eastern District of Virginia in this suit, Frederick M. Weade has no justiciable claim and was improperly joined as a party plaintiff, since the Virginia statute (Code of Virginia, Section 5134) does not permit an action by the husband for services, loss of society, or expenses.

3. The issue of contributory negligence was submitted to the jury, which, by its verdict, necessarily found either that petitioners were not contributorily negligent or that any such contributory negligence was not the direct or proximate cause of the injuries. As this cause was on the law side of the district court, the question remains whether a verdict should have been directed against petitioners on this issue. And even if maritime law is applicable, the contributory negligence of petitioners revealed by the record would probably serve to make the verdict excessive.

4. Irrespective of the issue of contributory negligence, the verdicts returned by the jury of \$50,000 to Mrs. Weade, of \$5,000 to Mrs. Stine-meyer, and of \$1,000 to Mr. Weade, were probably excessive.

5. Lastly, the District Court should have declared a mistrial for prejudicial statements of petitioners, before the jury, concerning insurance, which impressed the thought that respondent was protected from all financial loss by government-provided insurance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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